Toffoloni v. LFP Publishing Group, LLC Doc. 56 Att. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT,	)	
Plaintiff,	)	CASE NO. 1:08-cv-00421-TWT
vs.	)	
LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, et al,	)	
Defendant.	)	

AFFIDAVIT OF S. DEREK BAUER

STATE OF GEORGIA,

COUNTY OF FULTON.

Personally appeared before the undersigned officer duly authorized by law to administer oaths, S. Derek Bauer, who being first duly sworn, deposed and said as follows:

1.

My name S. Derek Bauer. I am over twenty-one (21) years of age and I am competent to make and give this Affidavit, and do so from personal knowledge.

2.

I am an attorney with the law firm of McKenna Long & Aldridge, LLP, and

Dockets.Justia.com

I represent defendant LFP Publishing Group, LLC ("LFP") in the above-styled action.

3.

I make this affidavit in support of LFP's Opposition To Plaintiff's Motion For Partial Summary Judgment As To Liability And, In The Alternative, Rule 56(F) Motion For An Extension Of Time To Respond To Plaintiff's Summary Judgment Motion.

4.

Counsel for the parties conducted an in-person Rule 26(f) conference on October 12, 2009. During that conference I informed counsel for Plaintiff that LFP needed to conduct discovery on several topics, including, among others, whether Plaintiff owns the right to pursue her claim of right of publicity on behalf of Nancy Benoit's estate, or whether that right belongs to some other individual(s) or entity pursuant to a conveyance.

5.

Plaintiff served her first interrogatories and requests for documents on LFP on October 16, 2009, well before the discovery period began, Document Index ("D.I.") 51; by agreement of counsel the parties have stipulated that LFP's responses will be due November 30, 2009. Plaintiff also filed her motion for partial summary judgment, D.I. 50-1, on October 16, 2009.

6.

The parties filed their Preliminary Report and Discovery Plan on October 28, 2009. (D.I. 53.) In that Report, the parties identified numerous topics on which discovery is needed. For LFP, these topics include, among others, Ms. Benoit's employment history; her business and professional contracts, including employment, licensing, sponsorship, endorsement and other agreements; income and revenue and activities generating same; tax records; her efforts to exploit her image and likeness, including modeling, acting, endorsement and/or other professional or amateur entertainment portfolios; and the circumstances of the Samansky photo shoot.

7.

Plaintiff's Motion for Partial Summary Judgment as to Liability, D.I. 50-1, argues that liability has been established based in part on assumed, but unproven facts on several of which LFP needs, has sought, but has not yet been provided any discovery. Specifically, Plaintiff alleges (but has not proven) that she is the duly appointed administrator and personal representative of the Estate of Ms. Benoit, Cmplt. ¶ 1, and that she has the legal right to control the use of Ms. Benoit's image, *id.* at ¶ 15. LFP needs discovery to determine whether Plaintiff is in fact the owner of the right she asserts and thus is the real party in interest in this matter. Further, Plaintiff has also alleged, but not proven, that Ms. Benoit did not license, release or otherwise authorize Defendant Samansky to use the images he took of her "for any purpose." (Cmplt. ¶¶ 10-13.) (The Complaint does not address whether Ms. Benoit later licensed, released or otherwise conveyed rights to the images to an individual or entity other than Defendant Samansky, a question to which LFP is entitled to an answer during discovery.) This fact has not been admitted by LFP, and thus remains contested and unproven.

8.

Most of the essential facts needed to be discovered by LFP (as identified in the Joint Preliminary Report and Discovery Plan), including the names of Ms. Benoit's employers, agents, licensees, business partners, public relations advisors or other representatives and/or advisors, and the contracts and licensing agreements respecting the commercial use of Ms. Benoit's image, are, LFP believes, within the control or personal knowledge of Plaintiff or her agents or representatives. Defendants believe that, given Ms. Benoit's long association with professional wrestling organizations, during her life Ms. Benoit licensed or otherwise may have transferred to one or more third parties substantial rights to exploit commercially her name and likeness. Discovery from Plaintiff is required on these open, unresolved, and unproven fact issues.

9.

LFP is diligently pursuing this needed discovery. The discovery period commenced on October 28, 2009. On November 5, 2009, I served on Plaintiff's counsel LFP's First Interrogatories and First Requests for Production of Documents to Plaintiff, which discovery requests address the open fact issues previously identified by LFP to Plaintiff's counsel in both the parties' Rule 26(f) conference and in the preparation and submission of the parties' Joint Preliminary Report and Discovery Plan. (*See* Exhibits 1 and 2 hereto.) Plaintiff's responses to LFP's discovery requests are not yet due, and Plaintiff has not yet responded to them.

10.

To date, including in her Initial Disclosures, D.I. 46, Plaintiff has not identified any individual(s) or entity with knowledge of the topics on which LFP needs discovery, nor has Plaintiff produced or described any documents or other information relevant to those topics.

11.

LFP will also likely need to take the depositions of Plaintiff, Ms. Benoit's ex-husband James Daus (who has submitted in affidavit in support of Plaintiff's Complaint), and Defendant Samansky; and to issue third-party subpoenas to and depose other persons or entities not yet identified, but whose identities are expected to be learned through discovery obtained from Plaintiff and Messrs. Daus and Samansky.

FURTHER, AFFIANT SAYETH NOT

This 5th day of November, 2009.

____
S. Derek Bauer

Sworn to and subscribed
before me this 5th day
of November, 2009.

____
NOTARY PUBLIC

INES M. ORTIZ NOTARY EXPIRES GEORGIA NOV. 2, 2012 PUBLIC COBB COUNTY

ATLANTA:5184706.1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrarix and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, v. LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z, Defendants.	)))))))))))))))))	CIVIL ACTION FILE NO. 1:08-CV-0421-TWT

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, vs. **LFP PUBLISHING GROUP, LLC** d/b/a Hustler Magazine, et al., Defendant.	CASE NO. 1:08-cv-00421-TWT

DEFENDANT LFP PUBLISHING GROUP, LLC'S
FIRST INTERROGATORIES TO PLAINTIFF

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Defendant LFP Publishing Group, LLC ("LFP") hereby serves upon Plaintiff Maureen Toffoloni ("Plaintiff") as Administrator and Personal Representative of the Estate of Nancy E. Benoit ("Ms. Benoit"), LFP's First Interrogatories to Plaintiff.

INSTRUCTIONS FOR INTERROGATORIES

Plaintiff is required to answer all of the following interrogatories fully, separately, and individually, in writing, and under oath within thirty (30) days from the date of service thereof. Each interrogatory is addressed to the personal knowledge of the Plaintiff, her attorneys, agents, or other representatives, or any other persons who are in possession of or may have obtained information for Plaintiff on her behalf or any other persons known by her to be acting or purporting to act for her or on her behalf. When a question is directed to Plaintiff, the question is also directed to each of the aforementioned persons.

Plaintiff has a duty to timely amend a prior response if she obtains information upon the basis of which (a) she knows that a response was incorrect when made, or (b) she knows that a response, though correct when made, is no longer correct.

DEFINITIONS

As used herein, the terms listed below are defined as follows:

1. "Document" means all written, typed, printed, photographic, graphic, electronic media (including audio and computer media), or recorded matter of every type and description, including statements, letters, handwritten notes, correspondence, emails, invoices, memoranda, records, notes, note books, drafts, data sheets, tapes, tape recordings, public statements, opinions, microfilm, microfiche, computer records and data whether in printed or electronic form (including but not limited to printouts, discs, and back-up tapes), telephone records

(including records which reflect computer communications via modem), partial or complete reports of telephone conversations, and any other writings or recordings.

2. "Person" means any natural person, corporation, partnership, proprietorship, association, governmental entity, agency, group, or any form of business entity or other organization, or group of persons.

3. "Plaintiff" "you" and "your" shall refer to Maureen Toffoloni, including her predecessors, successors, agents, representatives, investigators, or attorneys, or any other persons who are in possession of or may have obtained information from her or on behalf of her and/or Ms. Benoit or any other persons known to be acting or purporting to act on behalf of her and/or Ms. Benoit.

4. To "identify" a document means to state whether the document is subject to a claim of privilege or not, type or nature, date, author, recipient(s) and custodian(s) of a document.

In lieu of "identifying" any document, the document may be produced.

5. To "identify" a natural person means to state that person's full name, title, or affiliation, and current or last known address and telephone number. To "identify" a person that is a business or organization, state the name and address of such business or organization.

6. The "relevant period" means the time period beginning on Ms. Benoit's eighteenth birthday through and including the date of this First Interrogatories to Plaintiff.

INTERROGATORIES

1.

Identify each and every job held by Ms. Benoit during the relevant period, including the name of the employer, the job title held by Ms. Benoit, the dates during which Ms. Benoit held the job title and a description of the job's duties.

2.

Identify each source of Ms. Benoit's income during the relevant period.

3.

Identify any and all businesses owned or operated at any time by Ms. Benoit during the relevant period.

4.

Identify any and all partnerships in which Ms. Benoit was a partner at any time during the relevant period.

5.

Identify any and all corporations of which Ms. Benoit was a member and/or principal at any time during the relevant period.

6.

Identify any and all employment agreements, contracts, joint ventures or independent contractor engagements between Ms. Benoit and any other person during the relevant period.

7.

Identify any and all professional photographers or videographers with whom Ms. Benoit took part in a photography or videography shoot during the relevant period.

8.

Identify any and all persons who served as Ms. Benoit's talent agent, booking agent, press agent, public relations advisor or in any other similar representative or advisory role during the relevant period.

9.

Identify any documents or other evidence upon which you intend to rely that supports your assertion that Ms. Benoit did not license, release or otherwise authorize Mark Samansky to use the images he took of her.

10.

Identify any documents or other evidence upon which you intend to rely for your assertion that LFP published the images of Ms. Benoit without the authorization of Ms. Benoit or someone else with authority to act on her behalf.

11.

Identify any and all persons to whom Plaintiff or Ms. Benoit released, assigned and/or conveyed their or her rights to control or use Ms. Benoit's name, image, likeness, or any other aspect of her identity during the relevant period.

12.

Identify any and all contracts or agreements through which Plaintiff or Ms. Benoit released, assigned and/or conveyed to any person Plaintiff or Ms. Benoit's rights to control or use Ms. Benoit's name, image, likeness, or any other aspects of her identity.

13.

Identify any and all documents that evidence Plaintiff's intention to use for her commercial profit any images or likenesses of Ms. Benoit during Ms. Benoit's lifetime.

14.

Identify any and all documents that evidence Plaintiff's intention to use for her commercial profit the images taken by Mark Samansky that are the subject of this lawsuit.

15.

Identify any and all documents evidencing Plaintiff's actual use for her commercial profit of the images taken by Mark Samansky that are the subject of this lawsuit.

16.

Identify any and all documents that evidence Plaintiff's intention to license or contract to any other person her rights to use the images taken by Mark Samansky that are the subject of this lawsuit.

17.

Identify the names of each photographer for whom Ms. Benoit posed during the relevant period.

This 5th day of November 2009.

/s/ [signature]

James C. Rawls
Georgia Bar No. 596050
Barry J. Armstrong
Georgia Bar No. 022055
S. Derek Bauer
Georgia Bar No. 042537
Darrell J. Solomon
Georgia Bar No. 305922

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(716) 849-1333
(716) 849-1315 (facsimile)

Attorneys for LFP Publishing Group, LLC

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing **First Interrogatories to Plaintiff** by e-mail and hand delivery on the following attorneys of record:

Richard P. Decker
rdecker@hallmanwingate.com
F. Edwin Hallman, Jr.
ehallman@hallmanwingate.com
Richard A. Wingate
rwingate@hallmanwingate.com
Zachary M. Wilson, III
zwilson@hallmanwingate.com
HALLMAN & WINGATE, LLC
166 Anderson Street, S.E.
Suite 210
Marietta, GA 30060

This 5th day of November 2009.

S. Derek Bauer
Georgia Bar No. 042537

MCKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, NE, Suite 5300
Atlanta, GA 30308
(404) 527-4000
(404) 527-4198 (facsimile)

Attorneys for LFP Publishing Group, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrarix and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, v. LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z, Defendants.	)))))))))))))))))	CIVIL ACTION FILE NO. 1:08-CV-0421-TWT

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, vs. **LFP PUBLISHING GROUP, LLC** d/b/a Hustler Magazine, et al., Defendant.	CASE NO. 1:08-cv-00421-TWT

DEFENDANT LFP PUBLISHING GROUP, LLC'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Defendant LFP Publishing Group, LLC ("LFP") hereby serves upon Plaintiff Maureen Toffoloni ("Plaintiff") as Administrator and Personal Representative of the Estate of Nancy E. Benoit ("Ms. Benoit"), LFP's First Request for Production of Documents.

INSTRUCTIONS AND DEFINITIONS

As used herein, the terms listed below are defined as follows:

1. "Document" means all written, typed, printed, photographic, graphic, electronic media (including audio and computer media), or recorded matter of every type and description, including statements, letters, handwritten notes, correspondence, emails, invoices, memoranda, records, notes, note books, drafts, data sheets, tapes, tape recordings, public statements, opinions, microfilm, microfiche, computer records and data whether in printed or electronic form (including but not limited to printouts, discs, and back-up tapes), telephone records (including records which reflect computer communications via modem), partial or complete reports of telephone conversations, and any other writings or recordings.

2. "Person" means any natural person, corporation, partnership, proprietorship, association, governmental entity, agency, group, or any form of business entity or other organization, or group of persons.

3. "Plaintiff," "you" and "your" shall refer to Maureen Toffoloni, including her predecessors, successors, agents, representatives, investigators, or attorneys, or any other persons who are in possession of or may have obtained information from her or on her behalf or any other persons known to be acting or purporting to act on her behalf.

4. To "identify" a document means to state whether the document is subject to a claim of privilege or not, type or nature, date, author, recipient(s) and custodian(s) of a document.

In lieu of "identifying" any document, the document may be produced.

5. To "identify" a natural person means to state that person's full name, title, or affiliation, and current or last known address and telephone number. To "identify" a person that is a business or organization, state name and address of such business or organization.

6. The "relevant period" means the time period beginning on Ms. Benoit's eighteenth birthday through and including the date of this First Request for Production of Documents.

DOCUMENTS TO BE PRODUCED

1.

All documents that you may offer as exhibits at trial in this matter.

2.

All documents, including but not limited to all correspondence, relied upon, prepared by or used in any way by any person whom you may call as an expert witness at trial in this matter.

3.

Each and every iteration, version and incarnation of Ms. Benoit's professional resume during the relevant period.

4.

All employment agreements, contracts, joint venture agreements or independent contractor engagements between Ms. Benoit and any other person through which Ms. Benoit agreed to provide professional modeling services, including all amendments, addendums and revisions thereto.

5.

All employment agreements, contracts, joint venture agreements or independent contractor engagements between Ms. Benoit and any other person through which Ms. Benoit agreed to provide professional acting services, including all amendments, addendums and revisions thereto.

6.

All employment agreements, contracts, joint venture agreements or independent contractor engagements between Ms. Benoit and any other person through which Ms. Benoit agreed to provide services as a professional wrestler, entertainer, or performer, including all amendments, addendums and revisions thereto.

7.

Any and all other employment agreements, contracts, joint venture agreements or independent contractor engagements between Ms. Benoit and any other person, including all amendments, addendums and revisions thereto.

8.

All agreements between Ms. Benoit and any person serving as Ms. Benoit's talent agent, booking agent, press agent, public relations advisor or in any other similar representative or advisory role.

9.

All license agreements between Ms. Benoit and any other person or entity, including but not limited to Jim Crockett Promotions, Extreme Championship Wrestling, and World Championship Wrestling.

10.

All tax returns filed by Ms. Benoit with the Internal Revenue Service during the relevant period.

11.

Every document in any way relating to Ms. Benoit's participation in any professional and/or amateur photography or videography shoots.

12.

All pictures, videos, and other images of Ms. Benoit created as a result of a professional and/or amateur photography or videography shoot, regardless of whether the pictures, videos, or other images were published.

13.

All contracts or agreements through which Plaintiff or Ms. Benoit released to any person Plaintiff's or Ms. Benoit's rights to any pictures, videos, or other images of Ms. Benoit created as a result of a professional and/or amateur photography or videography shoot, regardless of whether the pictures, videos, or other images were published.

14.

All contracts and/or other agreements through which Plaintiff or Ms. Benoit released to any person Plaintiff or Ms. Benoit's rights to control or use Ms. Benoit's name, image, likeness, or any other aspect of her identity.

15.

All documents that support your assertion that Ms. Benoit did not license, release or otherwise authorize Mark Samansky to use the images he took of her.

16.

All documents that support your assertion that LFP published the images of Ms. Benoit without the authorization of Ms. Benoit or someone else with authority to act on her behalf.

17.

All documents evidencing Plaintiff's intention to use for her commercial profit any image or likeness of Ms. Benoit during the relevant period.

18.

All contracts and/or other agreements through which Plaintiff profited from the use of any image or likeness of Ms. Benoit during the relevant period.

19.

All documents evidencing evidence Plaintiff's intention to use for commercial profit the images taken by Mark Samansky that are the subject of this lawsuit.

20.

All contracts and/or other agreements through which Plaintiff has profited from the images taken by Mark Samansky that are the subject of this lawsuit.

21.

All documents that evidence Plaintiff's intention to license or contract to any other person her rights to use the images taken by Mark Samansky that are the subject of this lawsuit.

22.

All documents, including but not limited to contracts and agreements, through which Plaintiff has licensed or contracted to any other person her rights to use the images taken by Mark Samansky that are the subject of this lawsuit.

23.

All documents that show licensed- or consented-to commercial uses of Ms. Benoit's name, image or likeness during the relevant period.

24.

A copy of Ms. Benoit's complete modeling portfolio.

This 5th day of November 2009.

James C. Rawls
Georgia Bar No. 596050
Barry J. Armstrong
Georgia Bar No. 022055
S. Derek Bauer
Georgia Bar No. 042537
Darrell J. Solomon
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Attorneys for LFP Publishing Group, LLC

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing **First Request for Production of Documents** by e-mail and hand delivery on the following attorneys of record:

Richard P. Decker
rdecker@hallmanwingate.com
F. Edwin Hallman, Jr.
ehallman@hallmanwingate.com
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Zachary M. Wilson, III
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HALLMAN & WINGATE, LLC
166 Anderson Street, S.E.
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Marietta, GA 30060

This 5th day of November 2009.

S. Derek Bauer

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Attorneys for LFP Publishing Group, LLC